Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

ROBERT C. ARNOLD, *et al.*,

Petitioners,

v.

MERIT SYSTEMS PROTECTION BOARD
and TENNESSEE VALLEY AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of Supreme Court precedent mandating a fair opportunity for review, may an administrative agency refuse to hear on the merits a petition for review that was timely filed, but defective.

LIST OF PARTIES

The names of all Petitioners are listed in Appendix B at 14a-21a.

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Petitioners respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit affirming the decision of the Merit Systems Protection Board is unpublished and without opinion, but can be found at 2000 WL 28172. (App. A). The opinion of the Merit Systems Protection Board is reported at *Arnold, et al. v. Tennessee Valley Authority*, 81 M.S.P.R. 266 (1999). (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") was entered on January 11, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

5 C.F.R. § 1202.114(f) provides:

> (f) Late filings. Any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion that shows

good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (e) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include:

(1) The reasons for failing to request an extension before the deadline for the submission; and

(2) A specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence.

Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

5 U.S.C. § 7703(c) provides:

> (c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be —
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence;
>
> except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

STATEMENT OF THE CASE

The fundamental question in this case is whether an administrative agency may refuse to hear on its merits a timely filed but defective petition for review. The issue here is one of broad scope and application. Many substantive rights are now placed before administrative agencies. Petitioners should be entitled to a fair review of agency action whenever a request for review has been timely filed.

The appeals and petitions at issue here have been arbitrarily consolidated in various forms throughout their history, and have been treated inconsistently by the administrative judge and the Merit Systems Protection Board ("MSPB"). The decisions in this case conflict with the precedents of this Court, the Court of Appeals, and the MSPB, and restrict the rights of all administrative appellants. To fully appreciate the significance of the issues presented by this case, it is essential to consider its procedural background.

Petitioners are former public safety officers for the Tennessee Valley Authority ("TVA") and had been employed by TVA in the Nuclear Security Organization at three TVA plants: the Browns Ferry Nuclear Plant, the Watts Bar Nuclear Plant, and the Sequoyah Nuclear Plant. TVA decided to contract out all of its security guard services and issued a reduction in force ("RIF") notice as a result to all petitioners. Although the result of a single decision by TVA, these RIF notices were sent on different dates by location. By June 2, 1998, petitioners had all been terminated from their employment with TVA. Petitioners are now employed by the contract provider of security guard services at lower pay and with fewer benefits than those they received as employees of TVA.

Between April 21, 1998 and June 9, 1998, petitioners filed appeals with the MSPB of their separation from their employment with TVA. The administrative judge consolidated these appeals by location. Those petitioners who had been separated from the Browns Ferry Nuclear Plant were consolidated into *Robert C. Arnold, et al. v. Tennessee Valley Authority*, No. AT-0351-98-0530-I-1. Those petitioners who had been separated from the Watts Bar

Nuclear Plant were consolidated into *Estes F. Alder, et al. v. Tennessee Valley Authority*, No. AT-0351-98-0770-I-1. Those petitioners who had been separated from the Sequoyah Nuclear Plant were consolidated into *Luther C. Ashe, Jr., et al. v. Tennessee Valley Authority*, No. AT-0351-98-0679-I-1.

On June 23, 1998, the administrative judge filed a single Order, with only the *Arnold* caption and docket number, limiting "these appeals" to oral argument by telephone. (App. F). On June 24, 1998, counsel for petitioners filed a Memorandum in Support of Appeal in two of the three cases — *Arnold* and *Ashe*. TVA responded to these memoranda. Although no Memorandum was filed in *Alder*, the MSPB apparently assumed that the *Ashe* memorandum covered *Alder* and filed a copy of it in their *Alder* file. *See* May 6, 1999 Merit Systems Protection Board Certified Index, at 5. TVA also filed a response in *Alder*.

The single telephone hearing covering all three consolidated sets of appeals was held on July 23, 1998. All of petitioners' appeals were heard together and were limited to oral argument by the June 23, 1998 *Arnold* order. This order was issued only under the *Arnold* caption and docket number, but was construed by the administrative judge, TVA, and petitioners as covering petitioners' appeals in *Alder* and *Ashe*, as well.

After the hearing, the administrative judge affirmed the RIFs of petitioners and issued three separate but essentially identical decisions on August 14, 1998 (App. E), August 17, 1998 (App. D), and August 18, 1998 (App. C). Therefore, the single consolidated hearing limited to oral argument by a single order in one of the cases resulted in three separate deadlines for petitioning for review by the MSPB: September

18, 1998 for the *Arnold* petition, September 21, 1998 for the *Alder* petition, and September 22, 1998 for the *Ashe* petition. Petitioners, however, believed that a single petition could be filed under the *Arnold* caption, which was the same caption as the administrative judge's June 23rd order that covered all three cases. Petitioners also believed that the deadline to file that petition was September 22, 1998, the petition date set by the final decision rendered by the administrative judge.

Petitioners filed a petition for review on September 22, 1998 under the *Arnold* caption and docket number, intending this petition to cover all of the petitioners. The Clerk of the Board advised petitioners that the petition for review appeared to be untimely because the *Arnold* petition had a finality date of September 18, 1998. Counsel for petitioners immediately filed a declaration and requested an extension of time on October 1, 1998, explaining the misunderstanding that had resulted in a miscaptioning of the petition and the filing of a single petition instead of three separate petitions. At this time petitioners also filed separate petitions, identical to the petitions previously filed, for review of *Alder* and *Ashe*, along with nearly identical declarations and requests for leniency and an extension of time.

The agency dismissed all three of the petitions for review as untimely filed on February 26, 1999, even though at least a third of the petitioners had timely filed under an incorrect caption. The United States Court of Appeals for the Federal Circuit affirmed on January 11, 2000 without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW CONFLICT WITH THIS COURT'S PRIOR RULINGS IN FAVOR OF ALLOWING PETITIONERS TO BE HEARD ON THE MERITS.

Petitioners timely filed an inartful pleading and were denied review of their petitions, and therefore were denied due process of law under the Fifth Amendment to the United States Constitution. When the intention to seek review is clear, decisions on the merits should not be avoided on the basis of mere technicalities. *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Although *Foman* dealt with a notice of appeal, its precedent has been applied to petitions for review of administrative actions. *See Castillo-Rodriguez v. Immigration and Naturalization Service*, 929 F.2d 181 (5th Cir. 1991).

Petitioners reasonably believed that a single petition for review was adequate because of the procedural history of their appeals. The same factual and legal issues applied to all petitioners, there had been a single decision to RIF by TVA, there had been a single order limiting all of the petitioners to oral argument at the hearing on their appeals, and there had been a single hearing. For some reason, however, this single hearing resulted in three separate initial decisions that were released on three different days. It was reasonable to believe that because of the sequential nature of the several almost identical decisions that petitioners received over the course of a week, that the decision resulting from the hearing was not final and complete until the last initial decision was received.

The petition for review was also filed before the final of the three deadlines, and was therefore effective notice of an intent to request review for at least one third of the petitioners, if not for all of them.

Statutes of limitation represent "a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time" and that there is a right to be free of stale claims "that in time comes to prevail over the right to prosecute them." *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 356-57, 62 L. Ed. 2d 259 (1979), *quoting Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944). In the present case, the MSPB was put on notice on September 22, 1998 that petitioners intended to request review of the decision of the administrative judge. The factual and legal issues were identical for all of the petitioners, as is evidenced by the consolidation of all petitioners into one group for a hearing, the MSPB's assumption that a memorandum filed by one part of the group applied to another part of the group, and the issuance of a single order limiting all petitioners to a single oral argument at the hearing.

This Court has noted that time limits can be tolled where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 458-59, 112 L. Ed. 2d 435 (1990), *citing Burnett v. New York Central R. Co.*, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965); *Herb v. Pitcairn*, 325 U.S. 77, 65 S. Ct. 954, 89 L. Ed. 1483 (1945); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) ("The mere fact that a federal statute

providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.")

It was not until after the September 22 petition for review was filed and the Clerk of the Board sent notification that the petition would be considered untimely that petitioners were on notice that the administrative judge was not treating the petitions as one matter, as had been done in the order and at the hearing. The three separate groups of petitioners were only a clerical distinction — there was no functional distinction among the petitioners. The groups were, in fact, so similar that the administrative judge issued nearly identical opinions. Once this matter came before the full MSPB, they also consolidated it into one matter. In fact, Footnote 1 of the Opinion of the MSPB states that it did not even find it necessary to refer to the record in *Ashe* and *Alder*. (App. B, at 6a).

Petitioners gave clear notice of their intent to ask for review of the administrative judge's decision. They filed a petition under the *Arnold* caption, the same caption used by the administrative judge in her June 23, 1998 order that applied to all of the petitioners. The petition was filed by the last of the three dates set forth in a series of identical orders that were issued within days of each other as a result of a single hearing. Petitioners also acted to correct any deficiency in their pleading immediately upon being notified of the deficiency in their pleading. There is precedent that a petitioner should be granted an opportunity to correct his timely filed defective petition, but the MSPB did not do so here. *See, e.g., Ray v. Department of Labor*, 60 M.S.P.R. 624 (1994).

The MSPB erred in not allowing petitioners to have their petitions heard on the merits. The MSPB will waive its time limits for filing a petition for review upon a showing of good cause for the untimely filing. 5 C.F.R. § 1201.114(f). To establish good cause, a petitioner must show that he exercised diligence or ordinary prudence under the circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). Factors to be considered in determining whether to excuse the untimely filing include the length of the delay, whether the petitioner was notified of the time limit or was otherwise aware of it, the reasonableness of the petitioner's excuse, the petitioner's showing of due diligence, the degree to which negligence has been shown to be present or absent, whether any neglect is "excusable" neglect, and whether the petitioner has presented evidence of the existence of circumstances beyond his control that affected their ability to comply with the time limits. *Id.* "Excusable neglect" is neglect that a reasonably prudent person might manifest under the circumstances. *Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1582 (Fed. Cir. 1994).

In *Pidock v. Department of the Treasury*, 64 M.S.P.R. 322 (1994), the MSPB found that where a petition for attorney fees was timely served on the agency, the delay was short, there was no prejudice from the delay, and the appellant intended to file with the board but sent the petition to the agency by mistake, that there was a clear intent to file a petition and the delay resulted from a filing error rather than a failure to file at all. Therefore, the appellant exercised due diligence in his effort to make a timely filing and there was good cause to waive the time limit. *Id.* at 326. The present case has been decided differently from these similar cases before the MSPB and is in conflict with precedent.

II.

THE MSPB'S ERROR IN DISMISSING THE PETITIONS AS UNTIMELY FILED WAS EGREGIOUS IN LIGHT OF THEIR OWN CONFUSION REGARDING THE APPEALS AND PETITIONS.

Petitioners timely filed a defective petition covering all petitioners. However, even if two of the three petitions were to be considered untimely filed, it was still egregious error for the MSPB to dismiss any of the petitions as untimely in light of its own confusion. The MSPB and TVA have argued that petitioners should not have been confused by the proceedings before the administrative judge and the MSPB, yet they have evidenced the same confusion. In her June 23, 1998 order limiting the appeals to oral argument by telephone, the administrative judge noted that petitioners had not filed a memorandum in support of their appeals. Memoranda were filed on the next day by petitioners in two of the groups, *Arnold* and *Ashe*, and TVA was ordered to respond to these memoranda and did so. No memorandum was ever filed in the *Alder* consolidation. However, the Certified Index clearly shows that the *Alder* file has such a memorandum — which is, in fact, a copy of the *Ashe* memorandum. *See* May 6, 1999 Merit Systems Protection Board Certified Index, at 5. It was never filed in *Alder*, yet the administrative judge apparently assumed that it covered the *Alder* petitioners when filed under another caption. The June 23, 1998 order also, as noted previously, served to limit all three groups of petitioners to oral argument at a single hearing. There is no mention made of the *Ashe* or *Alder* petitioners, captions, or docket numbers, yet all of the parties assumed that the *Arnold* order covered them.

If an administrative judge errs in setting forth the date on which a petition for review is to be filed, this constitutes good cause. *See, e.g.*, *Reynolds v. Department of Veterans Affairs*, 75 M.S.P.R. 509 (1997); *Anderson v. Department of the Air Force*, 51 M.S.P.R. 691 (1991); *Ensinger v. Department of the Air Force*, 36 M.S.P.R. 430 (1988). When an administrative judge, as in the present case, treats a single caption and case number as covering an entire group of consolidated petitioners, the petitioners' reliance upon this is understandable, and they should similarly be allowed to be heard on the merits of their petitions. Although a failure to understand direct and explicit language does not generally constitute good cause for an untimely filing, it is excusable when the language in the Board's orders is not explicit and may have contributed to the appellant's and/or his attorney's failure to understand. *Brackins v. Office of Personnel Management*, 66 M.S.P.R. 535, 541 (1995).

The MSPB has also found that a petition for review will be accepted, even though untimely filed, where the petitioner's neglect was excusable because it was

> rooted in the confusion spawned by the alternate bases of dismissal of the petition for appeal posited in the acknowledgement order and the agency's motion to dismiss. Instead of following the instructions in the initial decision that a petition for review must be filed by [a certain date], she relied on the suggestion in the acknowledgement order that the Board would have jurisdiction over her appeal if she refiled after her EEO complaint had been pending for 120 days.

Pendarvis v. Department of the Navy, 69 M.S.P.R. 492 (1996). When a petitioner receives conflicting directions from the administrative judge, the neglect may be excusable. *See Id.* Further, as is the case here, there was no lack of diligence in the attempt to pursue the appeal. *Id.*

The Court of Appeals also erred in not overturning the MSPB's dismissal of the petitions as untimely filed. The Court of Appeals can review board decisions when they are: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. *Forest v. Merit Systems Protection Board*, 47 F.3d 409, 410 (Fed. Cir. 1995), *citing* 5 U.S.C. § 7703(c) (1988). The Court of Appeals has held that when there is confusion over a case number and petitioner had review of other cases pending before the board, and the board never recognized or addressed this confusion, dismissing the petition as untimely filed was error. *Strickland v. Merit Systems Protection Board*, 748 F.2d 681 (Fed. Cir. 1984). The board should "give wide latitude to appellants' petitions and will not technically construe the Board's regulatory and procedural requirements." *Neely v. Department of the Air Force*, 3 M.S.P.B. 338 (1980). Length of delay is also an important factor for the Board to consider in deciding whether to waive time limits. *Ladomirak v. Office of Personnel Management*, 72 M.S.P.R. 87 (1996), Erdreich, J., dissenting.

It is, therefore, an egregious error for the MSPB to refuse to consider the petitions for review in this case when petitioners relied upon the prior treatment by the administrative judge and made the same error. If there was a delay in filing the petitions it was extremely short, and petitioners exercised diligence and ordinary prudence to the same extent that the administrative judge and the agency did.

CONCLUSION

This case presents a question of whether administrative petitioners are entitled to be heard on the merits when they timely file a defective pleading. The agency and the appellate court incorrectly applied this Court's precedent. This issue is of general importance beyond any effect on these particular petitioners. If the MSPB and Court of Appeals decisions are allowed to stand, administrative petitioners who file a timely request for review may be denied an hearing on the merits, and therefore will be denied due process of law under the Fifth Amendment to the United States Constitution. These petitioners will have been denied review of their petitions due to their reliance upon the actions of the administrative judge and the MSPB. By granting petitioners' petition for certiorari, however, this Court can correct these decisions, which defy this Court's previous rulings mandating a fair opportunity for review, and provide that any administrative claimant who files a timely petition for review is entitled to be heard on the merits.

Accordingly, petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED JANUARY 11, 2000

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-3194

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Appendix A

DONALD R. THOMPSON, PETER A. THOMPSON, TERRY W. TYLER, DAVID H. USSERY, DONALD S. WARREN, TALMAGE L. WATSON, JR., JAMES A. WHITE, ESTES ALDER, CLARENCE E. ASHFORD, RONALD D. BARROW, THOMAS BARROW, JR., MELVIN BENFORD, CLIFTON BISHOP, DEBRA A. BLAKEMORE, MARY R. BLANSIT, WILSON BLEDSOE, WILLIAM BOYNTON, HAMILTON L. BROOME, JR., CARLOS R. BROWN, CAROLYN K. BROWN, JIMMY CAMERON, CHRISTOPHER H. CAMPBELL, ROY CHANDLER, JAMES COFFELT, ANTHONY B. COLLINS, MICHAEL CRAWLEY, JANET L. CRUMP, JOSEPH DOWNS, WARREN ELLIOT, PAULA R. ESSEX, NATHANIEL FLANAGAN, JAMES J. FORD, JR., CHRIS A. FOSTER, LARRY D. GLADDEN, TERRY D. GROVES, BILLY E. HARRIS, SLAUGHTER L. HENDERSON, GILFORD S. HOPKINS, MONROE W. JONES, BARBARA J. KELTCH, RANDALL F. KILGORE, EDWIN KLOPFER, JAMES S. LAWSON, JERRY LAYNE, KEITH L. MANNING, EARL MCCUISTON, WILLARD MCCULLOUGH, ROBERT MCLEOD, JERRY MORGAN, STEPHEN NORWOOD, VANESSA PARKS, JOHN PELHAM, WREBA E. POOLE, WILLIAM S. PRATER, CARL PRESLEY, ALVIN A. ROACH, JAMES H. ROBINSON, DONALD E. ROLLINS, JERRY A. ROMESBURG, JOHNNY N. RUSSELL, DWIGHT E. SCOTT, MICHAEL L. SEAY, DONALD B. SKILES, BARTON L. SMITH, GARREY J. SMITH, MICHAEL L. SMITH, RAYMOND H. SMITH, VANNOLAN M. SMITH, CLAYTA J. SNEED, LORI M. STEAVE, DONALD C. TIFFIN, DONALD M. UPCHURCH, EDWIN V. WALKER, CHRISDENATOR J. WEATHERLY, JOHNNY L. WHITE,

Appendix A

CHARLES L. WILKEY, LEROY WILLIAMS, JR., PAUL H. WILSON, KENNETH HATMAKER, LARRY MEREDITH, RALPH NAPIER, MICHAEL NEYMAN, LUTHER C. ASHE, JR., DAVID B. BAYLES, HOMER F. BOYD, CLAY E. BROWN, ROBERT W. CHRISTMAS, MICHAEL P. CASEY, NANCY G. DEARING, NICK L. EVERETT, JAMES H. FRADY, JOHN R. GARRISON, KIMBERLEY D. GIBSON, ANDY R. GOSS, WILLIAM R. HALE, JR., CHARLES R. HAMBY, JAMES E. HAMPTON, JR., VERNON L. HUFF, ALBERT J. JACK, MERVIN C. JOHNSON, MICHAEL S. JOHNSON, WILLIAM R. KEENER, WILLIAM R. MASON, RICHARD A. MCBAY, ANTHONY F. MCCABE, FRANK R. MOON, DANIEL F. MOORE, MILTON W. MOORE, LINDA G. NADEAU, DANIEL K. PASCHAL, LESLIE F. PHILLIPS, RICHARD W. RANDOLPH, ROBERT H. ROBERSON, DENNIS D. RODDY, EDWARD B. SEIBER, TERESA R. SHADDEN, STEVEN L. SHOEMATE, JACKIE M. SISK, JERRY L. SMITH, KAREN C. SMITH, WAYNE C. SMITH, JIMMY D. STRADER, HENRY F. SWICEGOOD, GEORGE D. TARBOX, JR., JIMMY R. TEAGUE, BETTY C. THOMAS, BILLY G. THOMAS, RUSSELL S. THOMAS, MARCIA J. THURMAN, BERNICE J. TINCH, ANDREA D. TRUE, HARRISON C. WALLING, MICHAEL W. WILKEY, MICHAEL H. WILSON, KELLY L. YOUNG, STEPHANIE D. WEAVER, DEBRA L. WEST, CRAIG C. BODNAR, BILLY D. CLAYTON, SHURRA S. CLAYTON and PATRICIA B. RYE,

Petitioners,

v.

Appendix A

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

TENNESSEE VALLEY AUTHORITY,

Intervenor.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). AT0351980530-I-1; AT0351980770-I-1; and AT0351980679-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (MICHEL, PLAGER and BRYSON, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED JAN 11 2000 s/ Jan Horbaly/BS

ISSUED AS A MANDATE: MARCH 3, 2000

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DATED FEBRUARY 26, 1999

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
AT-0351-98-0530-I-1

DATE: FEB 26 1999

ROBERT C. ARNOLD, ET AL.,

Appellants,

v.

TENNESSEE VALLEY AUTHORITY,

Agency.

* * *

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellants petitioned for review of the three initial decisions in three consolidated appeals, i.e., *Arnold v.*

Appendix B

Tennessee Valley Authority, MSPB Docket No. AT-0351-98-0530-I-1;[1] *Alder v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0770-I-1;[2] and *Ashe v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0679-I-1,[3] that affirmed their separations pursuant to the agency's reduction in force (RIF) actions. Because those three consolidated appeals are factually similar and are governed by the same legal rule, we hereby consolidate them for decision. *See* 5 U.S.C. § 7701(f). For the reasons set forth below, we DISMISS the petitions for review as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 The appellants were separated from their positions in the Nuclear Security organization at the agency's Browns Ferry Nuclear Plant, the Watts Bar Nuclear Plant, and the

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1. This appeal was consolidated below with the appeals of 64 other appellants. A list of all of the appellants and docket numbers included in that consolidation is set out in Appendix A to this decision. All references to the Appeal File are to the files in *Arnold v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0530-I-1.

2. This appeal was consolidated below with the appeals of 75 other appellants. A list of all of the appellants and docket numbers included in that consolidation is set out in Appendix B to this decision.

3. This appeal was consolidated below with the appeals of 57 other appellants. A list of all of the appellants and docket numbers included in that consolidation is set out in Appendix C to this decision.

Sequoyah Nuclear Plant during the agency's 1998 RIF actions. Appeal File (AF), Tab 6, Subtab 4C. The administrative judge (AJ) consolidated their timely appeals of those actions by location: *Robert C. Arnold, et al. v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0530-I-1, was named the lead case in the consolidated appeal consisting of those appellants who worked at the Browns Ferry Nuclear Plant (hereinafter "the Arnold consolidated appeal"); *Estes F. Alder, et al. v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0770-I-1, was named the lead case in the consolidated appeal consisting of those appellants who worked at the Watts Bar Nuclear Plant (hereinafter "the Alder consolidated appeal"); and *Luther C. Ashe, Jr., et al. v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0679-I-1, was named the lead cast in the consolidated appeal consisting of those appellants who worked at the Sequoyah Nuclear Plant (hereinafter "the Ashe consolidated appeal"). AF, Tab 3. The same attorneys represented the appellants in all three consolidated appeals. AF, Tab 5.

¶3 On July 23, 1998, the AJ, by agreement of the parties, held a telephonic hearing which covered all three consolidated appeals and was limited to oral argument. Arnold Initial Decision (ID) at 2 n.3. Based on the record and the arguments raised in that hearing, the AJ, on August 14, August 17, and August 18, 1998, respectively, issued separate initial decisions in the consolidated appeals, affirming the RIF separations of all of the appellants and finding their affirmative defenses unproven. Arnold ID at 3-7; Alder ID at 3-6; Ashe ID at 3-6. The initial decisions each notified the parties that a petition for review of the respective decision had to be filed with the Board by the

following dates in order to be timely: September 18, 1998 (a Friday) for the Arnold consolidated appeal, September 21, 1998 (a Monday) for the Alder consolidated appeal, and September 22, 1998 (a Tuesday) for the Ashe consolidated appeal. Arnold ID at 7; Alder ID at 7; Ashe ID at 7. The initial decisions further informed the parties that, unless petitions for review of those decisions were timely filed, they would become final on their respective due dates, i.e., September 18, 1998 for the Arnold consolidated appeal, September 21, 1998 for the Alder consolidated appeal, and September 22, 1998 for the Ashe consolidated appeal. *Id.*

¶4 On September 22, 1998, the appellants in the Arnold consolidated appeal, through their attorney representatives, filed a petition for review, indicating on the first page of the petition for review form that September 22, 1998 was the finality date of the initial decision. Arnold Petition for Review (PFR) File, Tab 1. The Clerk of the Board advised the Arnold appellants that the petition for review appeared to be untimely and gave them 15 days to submit an affidavit or statement signed under penalty of perjury showing good cause for the late filing. Arnold PFR File, Tab 2.

¶5 In response, one of the appellants' representatives timely filed a declaration signed under penalty of perjury on October 1, 1998,[4] stating that:

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4. Although the appellants' representatives mistakenly filed this declaration with the regional office on October 1, 1998, *see* Arnold PFR File, Tab 3, the Board treats a submission of a petition for review filed with the regional office as filed with the Board on the date it was filed with the regional office, *see Taylor v. Office of Personnel Management*, 73 M.S.P.R. 142, 143, *appeal dismissed*, 124 F.3d 224 (Fed. Cir. 1997) (Table).

> When this office began preparing the Petitions for Review on [the Board's] ruling, we inadvertently picked up one of the Initial Decisions, and mistakenly thought it was the only one and that it covered all three cases. We therefore filed a Petition for Review only in this case (again assuming that we were petitioning for review of all three cases). To complicate matters even further, although our associate[5] titled the Petition for Review as that of *Robert C. Arnold*, he picked up another Initial Decision (that of Luther C. Ashe) and copied the due date of September 22nd. That was also the date he had internally docketed as the date the Petition for Review (again assuming we were petitioning for all three cases) was due.

Id., Tab 3. She further asserted that they "just sorted all of this out yesterday" and requested the Board for leniency. *Id.*

¶6 On that same day, the appellants' representatives also filed identical petitions for review in the Alder and Ashe

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5. The petition for review in the Arnold consolidated appeal was filed by Quinten A. Daulton, Esquire, an attorney with the law firm of Witt, Gaither & Whitaker, P.C. who was one of the appellants' designated representatives. Arnold PFR File, Tab 1; AF, Tabs 5, 8. The October 1, 1998 declaration and the petitions for review in the Alder and Ashe consolidated appeals were filed by Rosemarie L. Bryan, Esquire, a different attorney in the same law firm, who, along with Stephen G. Kabalka, Esquire, then replaced Daulton and the other previously designated attorneys at Witt, Gaither & Whitaker, P.C. as the attorneys handling the appellants' representation at that firm on petition for review. *See id.*, Tab 3; Alder PFR File, Tabs 1, 4; Ashe PFR File, Tabs 1, 3.

consolidated appeals, accompanied by nearly identical declarations concerning the timeliness issue.[6] Alder PFR File, Tab 1; Ashe PFR File, Tab 1. The agency has timely responded in opposition to each of the petitions for review. See Arnold PFR File, Tab 4; Alder PFR File, Tab 5; Ashe PFR File, Tab 4.

ANALYSIS

¶7 An appellant is responsible for the errors of his chosen representative unless he has proven that his diligent efforts to prosecute an appeal were thwarted, without his knowledge, by his attorney's deceptions and negligence. *Dunbar v. Department of the Navy*, 43 M.S.P.R. 640, 643-45 (1990). Here the appellants have not alleged, let alone shown, that they actively monitored their consolidated appeals following the issuance of the initial decisions. Thus, the appellants are responsible for their representatives' late filing of their petitions for review.

¶8 Where an initial decision clearly states the instructions and deadline date for filing a petition for review, a party's failure to follow those instructions constitutes failure to exercise due diligence or ordinary prudence. *See, e.g., Pfeiffer v. Department of the Navy*, MSPB Docket No. SE-0752-96-0234-A-1, slip op. at 5 (Nov. 3, 1998); *McNevin*

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6. Because the declarations accompanying the petitions for review in the Alder and Ashe consolidated appeals are essentially identical to the October 1, 1998 declaration submitted in the Arnold consolidated appeal, all references to the October 1, 1998 declaration in this Opinion and Order will refer to the declaration found in the Arnold PFR File at Tab 3.

v. Department of the Air Force, 77 M.S.P.R. 108, 112 (1997). Here, the initial decisions clearly set forth the respective filing deadlines. *See* Arnold ID at 7; Alder ID at 7; Ashe ID at 7. The appellants' representatives have not alleged that they were confused by the language of the initial decisions concerning the petition for review filing deadlines; that the language of the initial decisions was ambiguous; or that they did not understand that the initial decisions set the following deadlines for filing petitions for review: September 18, 1998 for the Arnold consolidated appeal, September 21, 1998 for the Alder consolidated appeal, and September 22, 1998 for the Ashe consolidated appeal. Arnold PFR File, Tab 3 (October 1, 1998 declaration). Nor do they claim that they did not timely receive the three initial decisions. *Id.*

¶9 We find that the appellants were well aware that their appeals were separated into three separate consolidated appeals. The AJ specifically notified the parties that she was consolidating the appeals with the parties' agreement into three separate consolidated appeals by nuclear power plant. *See* AF, Tab 3. With the exception of the July 23, 1998 telephonic hearing which covered all three consolidations by agreement of the parties, the AJ treated the three consolidated appeals separately. *See, e.g.*, AF, Tab 9; Arnold ID at 2 n.3. Further, the appellants were represented by attorneys who have demonstrated a knowledge of Board procedures and who indicated below their awareness that there were separate consolidated appeals. *See, e.g.*, AF, Tab 8.

¶10 Moreover, it is plain from just the first two pages of the three initial decisions, that they are different decisions and that they apply to three different consolidated appeals.

See Arnold ID at 1-2; Alder ID at 1-2; Ashe ID at 1-2. The captions list different appellants and different docket numbers, the dates are different, and the introductions describe different positions at different nuclear plants. In essence, the appellants' representatives are asking the Board to excuse their failure to read the initial decisions. That, we will not do. *See Pfeiffer*, slip op. at 5; *McNevin*, 77 M.S.P.R. at 112; *see also Ray v. Department of Veterans Affairs*, 73 M.S.P.R. 321, 324 (where the initial decision clearly states the instructions and deadline date for filing a petition for review, a misunderstanding regarding the filing deadline does not establish good cause), *overruled on other grounds by Joyner v. U.S. Postal Service*, 76 M.S.P.R. 473 (1997); *Moore v. Department of the Treasury*, 41 M.S.P.R. 35, 37 (1989) (clerical errors of staff do not constitute good cause for the untimely filing of a petition for review).

¶11 Under all of these circumstances, we find that the appellants have not shown good cause for the late filing of their petitions for review and we therefore dismiss them as untimely filed.

ORDER

¶12 This is the final order of the Merit Systems Protection Board concerning the timeliness of the petitions for review. The initial decisions will remain the final decisions of the Board with regard to the merits of these appeals. 5 C.F.R. § 1201.113.

Appendix B

NOTICE TO THE APPELLANTS REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

Appendix B

APPENDIX A

Robert C. Arnold	AT-0351-98-0530-I-1
Roger L. Bell	AT-0351-98-0531-I-1
Charles W. Belue	AT-0351-98-0628-I-1
Michael E. Bloodworth	AT-0351-98-0533-I-1
Ralph D. Blackwood	AT-0351-98-0532-I-1
Susan D. Bloodworth	AT-0351-98-0534-I-1
Robert P. Brown	AT-0351-98-0535-I-1
Grady L. Bryant	AT-0351-98-0536-I-1
William D. Burwell	AT-0351-98-0537-I-1
Donald Calvin	AT-0351-98-0538-I-1
Cipriano C. Chavez	AT-0351-98-0539-I-1
Stanley L. Choat	AT-0351-98-0540-I-1
Gary R. Cobb	AT-0351-98-0541-I-1
Judy A. Cooley	AT-0351-98-0542-I-1
Waylon D. Cottles	AT-0351-98-0543-I-1
Robert M. Dawson, Jr.	AT-0351-98-0544-I-1
David L. Eddy	AT-0351-98-0545-I-1
Gregory A. Ellenburg	AT-0351-98-0546-I-1
Charles G. Erwin	AT-0351-98-0547-I-1
Robert G. Erwin	AT-0351-98-0548-I-1
Roger W. Foster	AT-0351-98-0549-I-1
Loyd V. Frost	AT-0351-98-0550-I-1
William D. Gardner, Jr.	AT-0351-98-0573-I-1
David A. Gasque	AT-0351-98-0574-I-1
Mary K. Goodwin	AT-0351-98-0575-I-1
Ralph O. Grissiom	AT-0351-98-0576-I-1
Phillip L. Hardaway	AT-0351-98-0616-I-1
Johnnie W. Hardiman	AT-0351-98-0551-I-1
Daniel J. Hunt	AT-0351-98-0552-I-1

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Shields L. Jones	AT-0351-98-0553-I-1
Charles D. Lawson	AT-0351-98-0555-I-1
Wayne M. Lentz	AT-0351-98-0554-I-1
James D. Longshore	AT-0351-98-0556-I-1
Timothy L. Maddox	AT-0351-98-0559-I-1
James M. Major, III	AT-0351-98-0557-I-1
Jonathan C. Marshall	AT-0351-98-0558-I-1
Karla G. McAllister	AT-0351-98-0592-I-1
Ricky E. McDougal	AT-0351-98-0560-I-1
Donald L. McGrady	AT-0351-98-0561-I-1
Glenn D. Naylor	AT-0351-98-0562-I-1
James R. Newton	AT-0351-98-0563-I-1
Mary E. Nichols	AT-0351-98-0564-I-1
Roger D. Nichols	AT-0351-98-0565-I-1
Terry E. Nixon	AT-0351-98-0566-I-1
Mitzie C. Parker	AT-0351-98-0567-I-1
Patrick L. Parker	AT-0351-98-0568-I-1
Anthony L. Parks	AT-0351-98-0569-I-1
William E. Phillips	AT-0351-98-0570-I-1
Elaine M. Reece	AT-0351-98-0571-I-1
Arthur L. Ricks	AT-0351-98-0572-I-1
Roland E. Rogers	AT-0351-98-0577-I-1
David A. Shaneyfelt	AT-0351-98-0578-I-1
David C. Sloan, Jr.	AT-0351-98-0579-I-1
Alton T. Smith	AT-0351-98-0580-I-1
Roger D. Smith	AT-0351-98-0581-I-1
Jackie P. Stewart, Jr.	AT-0351-98-0582-I-1
John W. Stewart	AT-0351-98-0583-I-1
Hal H. Swartz	AT-0351-98-0584-I-1
Donald R. Thompson	AT-0351-98-0585-I-1
Peter A. Thompson	AT-0351-98-0586-I-1

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Terry W. Tyler	AT-0351-98-0587-I-1
David H. Ussery	AT-0351-98-0588-I-1
Donald S. Warren	AT-0351-98-0589-I-1
Talmage L. Watson, Jr.	AT-0351-98-0590-I-1
James A. White	AT-0351-98-0591-I-1

APPENDIX B

Estes Alder	AT-0351-98-0770-I-1
Clarence E. Ashford	AT-0351-98-0774-I-1
Ronald D. Barrow	AT-0351-98-0775-I-1
Thomas Barrow, Jr	AT-0351-98-0776-I-1
Melvin Benford	AT-0351-98-0777-I-1
Clifton Bishop	AT-0351-98-0778-I-1
Debra A. Blakemore	AT-0351-98-0779-I-1
Mary R. Blansit	AT-0351-98-0780-I-1
Wilson Bledsoe	AT-0351-98-0781-I-1
William Boynton	AT-0351-98-0782-I-1
Hamilton L. Broome, Jr.	AT-0351-98-0783-I-1
Carlos R. Brown	AT-0351-98-0784-I-1
Carolyn K. Brown	AT-0351-98-0785-I-1
Jimmy Cameron	AT-0351-98-0786-I-1
Christopher H. Campbell	AT-0351-98-0787-I-1
Roy Chandler	AT-0351-98-0788-I-1
James Coffelt	AT-0351-98-0789-I-1
Anthony B. Collins	AT-0351-98-0790-I-1
Michael Crawley	AT-0351-98-0791-I-1
Janet L. Crump	AT-0351-98-0792-I-1
Joseph Downs	AT-0351-98-0793-I-1
Warren Elliott	AT-0351-98-0794-I-1
Paula R. Essex	AT-0351-98-0795-I-1
Nathaniel Flanagan	AT-0351-98-0796-I-1
James J. Ford, Jr.	AT-0351-98-0797-I-1
Chris A. Foster	AT-0351-98-0798-I-1
Larry D. Gladden	AT-0351-98-0799-I-1
Terry D. Groves	AT-0351-98-0800-I-1
Billy E. Harris	AT-0351-98-0801-I-1
Slaughter L. Henderson	AT-0351-98-0803-I-1

Appendix B

Gilford S. Hopkins	AT-0351-98-0804-I-1
Monroe W. Jones	AT-0351-98-0805-I-1
Barbara J. Keltch	AT-0351-98-0806-I-1
Randall F. Kilgore	AT-0351-98-0807-I-1
Edwin Klopfer	AT-0351-98-0808-I-1
James S. Lawson	AT-0351-98-0809-I-1
Jerry Layne	AT-0351-98-0810-I-1
Keith L. Manning	AT-0351-98-0811-I-1
Earl McCuiston	AT-0351-98-0812-I-1
Willard McCullough	AT-0351-98-0813-I-1
Robert McLeod	AT-0351-98-0814-I-1
Jerry Morgan	AT-0351-98-0816-I-1
Stephen Norwood	AT-0351-98-0819-I-1
Vanessa Parks	AT-0351-98-0820-I-1
John Pelham	AT-0351-98-0821-I-1
Wreba E. Poole	AT-0351-98-0822-I-1
William S. Prater	AT-0351-98-0823-I-1
Carl Presley	AT-0351-98-0824-I-1
Alvin A. Roach	AT-0351-98-0825-I-1
James H. Robinson	AT-0351-98-0826-I-1
Donald E. Rollins	AT-0351-98-0827-I-1
Jerry A. Romesburg	AT-0351-98-0828-I-1
Johnny N. Russell	AT-0351-98-0829-I-1
Patricia B. Rye	AT-0351-98-0830-I-1
Dwight E. Scott	AT-0351-98-0831-I-1
Michael L. Seay	AT-0351-98-0832-I-1
Donald B. Skiles	AT-0351-98-0833-I-1
Barton L. Smith	AT-0351-98-0834-I-1
Garrey J. Smith	AT-0351-98-0835-I-1
Michael L. Smith	AT-0351-98-0836-I-1
Raymond H. Smith	AT-0351-98-0837-I-1
Vannolan M. Smith	AT-0351-98-0838-I-1

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Clayta J. Sneed	AT-0351-98-0839-I-1
Lori M. Steave	AT-0351-98-0840-I-1
Donald C. Tiffin	AT-0351-98-0841-I-1
Donald M. Upchurch	AT-0351-98-0842-I-1
Edwin V. Walker	AT-0351-98-0843-I-1
Chrisdenator J. Weatherly	AT-0351-98-0844-I-1
Johnny L. White	AT-0351-98-0845-I-1
Charles L. Wilkey	AT-0351-98-0846-I-1
Leroy Williams, Jr.	AT-0351-98-0847-I-1
Paul H. Wilson	AT-0351-98-0848-I-1
Kenneth Hatmaker	AT-0351-98-0802-I-1
Larry Meredith	AT-0351-98-0815-I-1
Ralph Napier	AT-0351-98-0817-I-1
Michael Neyman	AT-0351-98-0818-I-1

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APPENDIX C

Luther C. Ashe, Jr.	AT-0351-98-0679-I-1
David B. Bayles	AT-0351-98-0680-I-1
Homer F. Boyd	AT-0351-98-0681-I-1
Clay E. Brown	AT-0351-98-0682-I-1
Robert W. Christmas	AT-0351-98-0684-I-1
Michael P. Casey	AT-0351-98-0685-I-1
Nancy G. Dearing	AT-0351-98-0686-I-1
Nick L. Everett	AT-0351-98-0687-I-1
James H. Frady	AT-0351-98-0688-I-1
John R. Garrison	AT-0351-98-0690-I-1
Kimberley D. Gibson	AT-0351-98-0691-I-1
Andy R. Goss	AT-0351-98-0692-I-1
William R. Hale, Jr.	AT-0351-98-0693-I-1
Charles R. Hamby	AT-0351-98-0694-I-1
James E. Hampton, Jr.	AT-0351-98-0695-I-1
Vernon L. Huff	AT-0351-98-0696-I-1
Albert J. Jack	AT-0351-98-0697-I-1
Mervin C. Johnson	AT-0351-98-0698-I-1
Michael S. Johnson	AT-0351-98-0699-I-1
William R. Keener	AT-0351-98-0700-I-1
William R. Mason	AT-0351-98-0701-I-1
Richard A. McBay	AT-0351-98-0702-I-1
Anthony F. McCabe	AT-0351-98-0703-I-1
Frank R. Moon	AT-0351-98-0704-I-1
Daniel F. Moore	AT-0351-98-0705-I-1
Milton W. Moore	AT-0351-98-0706-I-1
Linda G. Nadeau	AT-0351-98-0707-I-1
Daniel K. Paschal	AT-0351-98-0708-I-1
Leslie F. Phillips	AT-0351-98-0709-I-1
Richard W. Randolph	AT-0351-98-0710-I-1

Appendix B

Robert H. Roberson	AT-0351-98-0711-I-1
Dennis D. Roddy	AT-0351-98-0712-I-1
Edward B. Seiber	AT-0351-99-0713-I-1
Teresa R Shadden	AT-0351-98-0714-I-1
Steven L Shoemate	AT-0351-98-0715-I-1
Jackie M. Sisk	AT-0351-98-0716-I-1
Jerry L. Smith	AT-0351-98-0717-I-1
Karen C. Smith	AT-0351-98-0718-I-1
Wayne C. Smith	AT-0351-98-0719-I-1
Jimmy D. Strader	AT-0351-98-0720-I-1
Henry F. Swicegood	AT-0351-98-0721-I-1
George D. Tarbox, Jr.	AT-0351-98-0722-I-1
Jimmy R. Teague	AT-0351-98-0723-I-1
Betty C. Thomas	AT-0351-98-0724-I-1
Billy G. Thomas	AT-0351-98-0725-I-1
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Michael W. Wilkey	AT-0351-98-0731-I-1
Michael H. Wilson	AT-0351-98-0732-I-1
Kelly L. Young	AT-0351-98-0733-I-1
Stephanie D. Weaver	AT-0351-98-0742-I-1
Debra L. West	AT-0351-98-0735-I-1
Craig C. Bodnar	AT-0351-98-0753-I-1
Billy D. Clayton	AT-0351-98-0741-I-1
Shurra S. Clayton	AT-0351-98-0754-I-1

APPENDIX C — INITIAL DECISION OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, ATLANTA REGIONAL OFFICE IN *ASHE, et al. v. TENNESSEE VALLEY AUTHORITY*, DOCKET NO. AT-0351-98-0679-I-1 DATED AUGUST 18, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER
AT-0351-98-0679-I-1

DATE: AUG 18 1998

LUTHER C. ASHE, JR., et al.,

Appellants

v.

TENNESSEE VALLEY AUTHORITY,

Agency.

* * *

BEFORE

Lynn P. Yovino
Administrative Judge

Appendix C

INITIAL DECISION

INTRODUCTION AND JURISDICTION

Between May 28 and June 4, 1998, the 58 appellants[1] in this consolidated appeal timely filed appeals of their separations pursuant to a reduction in force (RIF), effective May 4, 1998. Prior to the RIF, the appellants held the positions of Lieutenant (PG-3), TVAN Responder (SG-2); TVAN Responder (SG-2) – Designated Union Representative, and Alarm Station Officer (SG-2) in the Nuclear Security organization at the Watts Bar Nuclear Plant, Tennessee Valley Authority (TVA).

The Board has jurisdiction over these appeals. 5 U.S.C. § 7701(a); 5 C.F.R. § 351.901. Because the appellants did not present a disputed issue of fact requiring an evidentiary hearing, the hearing was limited to oral argument, which was conducted by telephone on July 23, 1998.[2] For the reasons set forth below, the agency's actions ARE AFFIRMED.

---

1. Those 58 appellants and their docket numbers are listed in the Appendix attached to this initial decision.

2. Pending before the Board are two other groups of consolidated appeals involving appellants who were Security Guards at the Browns Ferry Nuclear Plant and the Sequoyah Nuclear Plant. *See Arnold, et al., v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0530-I-1 (Browns Ferry); *Alder, et al., v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0679-I-1 (Sequoyah). By agreement of the parties, the hearing held on July 23 covered all three consolidations, and a fourth appeal of *Patsy S. Davidson v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0896-I-1, which was severed from the *Alder* consolidation.

Appendix C

BURDENS OF PROOF

In a RIF appeal, the burden is on the agency to prove by a preponderance of the evidence that the RIF regulations were properly invoked due to management consideration of the character appropriately committed to agency discretion. *See* 5 U.S.C. § 7701(c)(1)(B); *Bjerke v. Department of Education*, 25 M.S.P.R. 310, 312 (1984). In addition, when challenged, the agency must also establish by preponderant evidence that the RIF regulations were properly applied with respect to the appellant. 5 U.S.C. § 7701(c)(1)(B); *Holmes v. Department of the Army*, 41 M.S.P.R. 612, 617 (1989), *aff'd*, 914 F.2d 271 (Fed. Cir. 1990) (Table).

The appellants stated that they were raising four issues in this appeal and requested a hearing on those issues: (1) TVA's actions violated the RIF provisions of Supplement Agreement 10; (2) TVA's actions violated the Office of Management and Budget Circular A-76; (3) TVA's actions discriminated against the appellants based on their age; and, (4) TVA's actions violated the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 1994 U.S.C.C.A.N. (108 Stat.) 3149 (codified at 38 U.S.C. § 4301, *et. seq.*) (USERRA). *See* Appeal File, Tab 8.

ANALYSIS AND FINDINGS

1. *The RIF regulations were properly invoked in this case.*

The agency may establish a prima facie case that the RIF regulations were properly invoked by coming forward

with evidence that the RIF was taken for one of the reasons set forth in 5 C.F.R. § 351.201(a)(2), *e.g.*, lack of work, shortage of funds, insufficient personnel ceiling, reorganization, the exercise of reemployment rights, or the reclassification of an employee's position due to erosion of duties . . . ." *Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195, 201 (1980). Once the agency makes out a prima facie case, the burden of going forward with rebuttal evidence shifts to the appellant but the burden of persuasion never shifts from the agency. *Id.* at 201-02. Thus, if the appellant presents no rebuttal evidence to challenge the bona fides of the agency's alleged reason for conducting the RIF, the agency's initial evidence will normally suffice to meet its burden of persuasion on this element. *Id.* at 201.

In this case, the agency's stated reason for invoking the RIF regulations was due to a reorganization. Specifically, the record reflects, and it is undisputed, that the RIF was conducted following the agency's decision to contract out the safety officer function which resulted in the appellant's position being abolished. *See* Agency File, Tab 4c. Accordingly, based on the evidence of record, I find that the agency established a prima facie case that it invoked the RIF regulations for a legitimate management reason, *i.e.*, reorganization. *See Kelley v. Railroad Retirement Board*, 20 M.S.P.R. 188, 189 (1984).

The appellants have not challenged the fact that a reorganization occurred. Their only challenge to the bona fides of the RIF concerns the agency's decision to contract out their jobs allegedly in violation of the Veterans Preference Act.

Appendix C

It is well settled that a decision to contract out jobs is a reorganization. *See Kelley v. Railroad Retirement Board*, 20 M.S.P.R. 188, 189 (1984); *Griffin v. Department of Agriculture*, 2 M.S.P.R. 168, 170-71 (1980). And, when an agency has invoked the RIF regulations for one of the management reasons specified in 5 C.F.R. § 351.201(a), which includes a reorganization, the Board lacks jurisdiction to review the managerial considerations underlying the agency's exercise of discretion. *See Streitfield v. Railroad Retirement Board*, 20 M.S.P.R. 182, 183 (1984); *Griffin*, 2 M.S.P.R. 168, 170 (1980). In *Griffin*, 2 M.S.P.R. at 170-71, the Board held that, even if the agency's decision to contract out was contrary to OMB Circular A-76, agency regulations, and the Veterans Preference Act, this would not confer on the appellants the right to challenge that decision under 5 C.F.R. Part 351, which is the exclusive source of the Board's jurisdiction in RIF cases. Thus, the appellants' contention that the agency violated OMB Circular A-76 and the Veterans Preference Act[3] when it decided to contract out the jobs in nuclear security is not reviewable.[4]

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3. The appellants' contentions that the agency's decision to contract out their jobs violated 5 U.S.C. § 3310 and 3320 and 5 C.F.R. Part 330 are unpersuasive. These statutory citations govern the application of veteran's preference to appointments in an agency and do not, in any way, restrict an agency's decision-making authority to contract out jobs or otherwise conduct a RIF. And, these regulatory provisions apply to the competitive service only (not to TVA positions which are all in the excepted service), and again, do not restrict the agency's decision-making to conduct a RIF.

4. The agency argues that it has independent procurement authority under section 9(b) of the TVA Act, 16 U.S.C. § 831h(b) (Cont'd)

Therefore, I conclude that the agency has met its burden of proof on this element and find that the RIF regulations were invoked for a legitimate management reason.[5]

2. *The agency established the RIF regulations were properly applied to the appellants.*

The appellants' competitive area for the RIF was the Watts Bar Nuclear Plant, and their competitive levels were: Lieutenant, TVAN Responder, TVAN Responder – Designated Union Representative, and Alarm Station Officer. The retention registers reflect that all employees at the Watts Bar Nuclear Plant in each of these competitive levels were terminated or placed in another position and that no

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(Cont'd)

(1994) and is not subject to Circular A-76 and to many other Federal procurement laws and regulations. In light of my finding that any issues relating to compliance with Circular A-76, or any other procurement laws or regulations, I need not decide whether OMB Circular A-76 applies to TVA.

5. Although the appellants raised an allegation of age discrimination even though only some of the appellants are over 40 years old, their allegation pertains to the decision to contract out their jobs — a decision which, as noted above, is unreviewable by the Board. For that reason, I found that the appellants did not raise a prima facie case of discrimination on an issue that is reviewable by the Board and an evidentiary hearing on that issue was not necessary under the circumstances. *Cf. Currier v. U.S. Postal Service*, MSPB Docket No. DC-0351-95-0631-B-1 (July 29, 1998) (administrative judge cannot dismiss an allegation of discrimination under Title VII of the Civil Rights Act of 1964 prior to a hearing for failure to set forth a prima facie case).

employees remained in any of these competitive levels after May 4, 1998. *See* Agency Response, Tab 4b. The appellants did not make a timely challenge to the proper construction of their competitive area or levels.

Prior to the oral argument, the appellants argued generally that the agency violated Supplementary Agreement 10 between TVA and the Salary Policy Employee Panel.[6] *See* Appeal File, Tab 8. The appellants did not, however, identify any specific provisions that were violated. During the oral argument, the appellants argued that the agency violated all the provisions of the agreement and, when asked for specific examples, identified Sections C (Competitive Areas) and E (Retention Registers) were violated. The appellants did not timely raise any issues in regard to the proper construction of their competitive areas.[7] Nevertheless, because all the positions in the appellants' competitive levels in their competitive area were abolished and the appellants did not challenge the construction of their competitive level within their competitive area, any issues pertaining to the

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6. In light of my findings in regard to the appellants' arguments concerning Supplemental Agreement 10, I need not decide the factual question presented by the agency whether the agreement was in effect at the time of the RIF or whether it applied to all appellants. *See* Appeal File, Tab 11.

7. In my Order dated May 11, 1998, the appellants were ordered to notify the Board whether they were raising any issue in regard to the proper construction of their competitive area and competitive level. *See* Appeal File, Tab 3. Although their June 24 response was untimely, I nonetheless considered their submission. They did not, however, raise any issue in that submission regarding the construction of their competitive area.

proper construction of their retention register were irrelevant. And, since their competitive area was identified in the Supplemental Agreement 10 as the Watts Bar Nuclear Plant, the appellants have not shown how that provision of the agreement was violated.

Because all of the positions in the appellant's competitive levels within their competitive area were abolished, I find that the RIF regulations were properly applied to the appellants. Accordingly, I find that the appellants were properly separated by RIF procedures following the abolishment of his position.

3. *The appellants did not show that they were separated because of discrimination for their prior military service.*

The appellants argue that the decision to contract out their jobs was made because of discrimination based upon their prior military service and that the Board has jurisdiction over such an allegation under USERRA. *See* Appeal File, Tab 8. The appellants acknowledge that not all of them are veterans, but they argue that the non-veterans were "casualties" of TVA's decision to fire the veterans. *Id.* They further argue that there is a predominance of veterans occupying the security guard positions. *Id.*

As noted above, the decision to contract out jobs is not a matter that is reviewable by the Board. In any event, the agency separated all employees in the security function, thus treating veterans and non-veterans alike. I find, therefore, that the appellants did not set forth a nonfrivolous allegation that the decision to contract out or to separate them was based

on their military status. And, in my view, the non-veteran appellants cannot claim the protection of USERRA because the veterans were discriminated against.

Accordingly, the appellants' allegations under USERRA are rejected.[8]

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/ Lynn P. Yovino
Lynn P. Yovino
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on SEP 22 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date

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8. During the oral hearing, the appellants argued for the first time that there were fewer veterans in the TVA Police Officer positions, which are in both a different competitive level and area than the Security Guard positions. Again, that argument attempts to challenge the validity of the decision to contract out an entire function and that challenge is unreviewable by the Board. Moreover, the appellants do not argue that there were no veterans in the Police Officer positions. In any event, the argument was not timely raised and was not considered for that reason.

of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to

provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. See 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this

initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). You may have up to 6 years to file such a civil action. See 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

Appendix C

ADDENDUM

Luther C. Ashe, Jr.	AT-0351-98-0679-I-1
David B. Bayles	AT-0351-98-0680-I-1
Homer F. Boyd	AT-0351-98-0681-I-1
Clay E. Brown	AT-0351-98-0682-I-1
Robert W. Christmas	AT-0351-98-0684-I-1
Michael P. Casey	AT-0351-98-0685-I-1
Nancy G. Dearing	AT-0351-98-0686-I-1
Nick L. Everett	AT-0351-98-0687-I-1
James H. Frady	AT-0351-98-0688-I-1
John R. Garrison	AT-0351-98-0690-I-1
Kimberley D. Gibson	AT-0351-98-0691-I-1
Andy R. Goss	AT-0351-98-0692-I-1
William R. Hale, Jr.	AT-0351-98-0693-I-1
Charles R. Hamby	AT-0351-98-0694-I-1
James E. Hampton, Jr.	AT-0351-98-0695-I-1
Vernon L. Huff	AT-0351-98-0696-I-1
Albert J. Jack	AT-0351-98-0697-I-1
Mervin C. Johnson	AT-0351-98-0698-I-1
Michael S. Johnson	AT-0351-98-00699-I-1
William R. Keener	AT-0351-98-0700-I-1
William R. Mason	AT-0351-98-0701-I-1
Richard A. McBay	AT-0351-98-0702-I-1
Anthony F. McCabe	AT-0351-98-0703-I-1
Frank R. Moon	AT-0351-98-0704-I-1
Daniel F. Moore	AT-0351-98-0705-I-1
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APPENDIX D — INITIAL DECISION OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, ATLANTA REGIONAL OFFICE IN *ALDER, et al. v. TENNESSEE VALLEY AUTHORITY*, DOCKET NUMBER AT-0351-98-0770-I-1 DATED AUGUST 17, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER
AT-0351-98-0770-I-1

DATE: AUG 17 1998

ESTES F. ALDER, ET AL.,

Appellants

v.

TENNESSEE VALLEY AUTHORITY,

Agency.

* * *

BEFORE

Lynn P. Yovino
Administrative Judge

Appendix D

INITIAL DECISION

INTRODUCTION AND JURISDICTION

On June 9, 1998, the 76 appellants[1] in this consolidated appeal timely filed appeals of their separations pursuant to a reduction in force (RIF), effective June 1, 1998. Prior to the RIF, the appellants held the positions of Security Shift Supervisor (PG-5), Lieutenant (PG-3), TVAN Responder (SG-2), Alarm Station Officer-Unarmed (SG-2), and Engineering Associate, (SE-5) in the Nuclear Security organization at the Sequoyah Nuclear Plant, Tennessee Valley Authority (TVA).

The Board has jurisdiction over these appeals. 5 U.S.C. § 7701(a); 5 C.F.R. § 351.901. Because the appellants did not present a disputed issue of fact requiring an evidentiary hearing, the hearing was limited to oral argument, which was conducted by telephone on July 23, 1998.[2] For the reasons set forth below, the agency's actions ARE AFFIRMED.

---

1. Those 76 appellants and their docket numbers are listed in the Appendix attached to this initial decision.

2. Pending before the Board are two other groups of consolidated appeals involving appellants who were Security Guards at the Browns Ferry Nuclear Plant and the Watts Bar Nuclear Plant. *See Arnold, et al., v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0530-I-1 (Browns Ferry); *Ashe, et al., v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0679-I-1 (Watts Bar). By agreement of the parties, the hearing held on July 23 covered all three consolidations, and a fourth appeal of *Patsy S. Davidson v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0896-I-1, which was severed from the *Alder* consolidation.

Appendix D

BURDENS OF PROOF

In a RIF appeal, the burden is on the agency to prove by a preponderance of the evidence that the RIF regulations were properly invoked due to management consideration of the character appropriately committed to agency discretion. *See* 5 U.S.C. § 7701(c)(1)(B); *Bjerke v. Department of Education*, 25 M.S.P.R. 310, 312 (1984). In addition, when challenged, the agency must also establish by preponderant evidence that the RIF regulations were properly applied with respect to the appellant. 5 U.S.C. § 7701(c)(1)(B); *Holmes v. Department of the Army*, 41 M.S.P.R. 612, 617 (1989), *aff'd*, 914 F.2d 271 (Fed. Cir. 1990) (Table).

The appellants stated that they were raising four issues in this appeal and requested a hearing on those issues: (1) TVA's actions violated the RIF provisions of Supplement Agreement 10; (2) TVA's actions violated the Office of Management and Budget Circular A-76; (3) TVA's actions discriminated against the appellants based on their age; and, (4) TVA's actions violated the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 1994 U.S.C.C.A.N. (108 Stat.) 3149 (codified at 38 U.S.C. § 4301, *et. seq.*) (USERRA). *See* Appeal File, Tab 8.

ANALYSIS AND FINDINGS

1. *The RIF regulations were properly invoked in this case.*

The agency may establish a prima facie case that the RIF regulations were properly invoked by coming forward

with evidence that the RIF was taken for one of the reasons set forth in 5 C.F.R. § 351.201(a)(2), *e.g.*, lack of work, shortage of funds, insufficient personnel ceiling, reorganization, the exercise of reemployment rights, or the reclassification of an employee's position due to erosion of duties. . . ." *Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195, 201 (1980). Once the agency makes out a prima facie case, the burden of going forward with rebuttal evidence shifts to the appellant but the burden of persuasion never shifts from the agency. *Id.* at 201-02. Thus, if the appellant presents no rebuttal evidence to challenge the bona fides of the agency's alleged reason for conducting the RIF, the agency's initial evidence will normally suffice to meet its burden of persuasion on this element. *Id.* at 201.

In this case, the agency's stated reason for invoking the RIF regulations was due to a reorganization. Specifically, the record reflects, and it is undisputed, that the RIF was conducted following the agency's decision to contract out the safety officer function which resulted in the appellant's position being abolished. *See* Agency File, Tab 4c. Accordingly, based on the evidence of record, I find that the agency established a prima facie case that it invoked the RIF regulations for a legitimate management reason, *i.e.*, reorganization. *See Kelley v. Railroad Retirement Board*, 20 M.S.P.R. 188, 189 (1984).

The appellants have not challenged the fact that a reorganization occurred. Their only challenge to the bona fides of the RIF concerns the agency's decision to contract out their jobs allegedly in violation of the Veterans Preference Act.

Appendix D

It is well settled that a decision to contract out jobs is a reorganization. *See Kelley v. Railroad Retirement Board*, 20 M.S.P.R. 188, 189 (1984); *Griffin v. Department of Agriculture*, 2 M.S.P.R. 168, 170-71 (1980). And, when an agency has invoked the RIF regulations for one of the management reasons specified in 5 C.F.R. § 351.201(a), which includes a reorganization, the Board lacks jurisdiction to review the managerial considerations underlying the agency's exercise of discretion. *See Streitfield v. Railroad Retirement Board*, 20 M.S.P.R. 182, 183 (1984); *Griffin*, 2 M.S.P.R. 168, 170 (1980). In *Griffin*, 2 M.S.P.R. at 170-71, the Board held that, even if the agency's decision to contract out was contrary to OMB Circular A-76, agency regulations, and the Veterans Preference Act, this would not confer on the appellants the right to challenge that decision under 5 C.F.R. Part 351, which is the exclusive source of the Board's jurisdiction in RIF cases. Thus, the appellants' contention that the agency violated OMB Circular A-76 and the Veterans Preference Act[3] when it decided to contract out the jobs in nuclear security is not reviewable.[4]

---

3. The appellants' contentions that the agency's decision to contract out their jobs violated 5 U.S.C. § 3310 and 3320 and 5 C.F.R. Part 330 are unpersuasive. These statutory citations govern the application of veteran's preference to appointments in an agency and do not, in any way, restrict an agency's decision-making authority to contract out jobs or otherwise conduct a RIF. And, these regulatory provisions apply to the competitive service only (not to TVA positions which are all in the excepted service), and again, do not restrict the agency's decision-making to conduct a RIF.

4. The agency argues that it has independent procurement authority under section 9(b) of the TVA Act, 16 U.S.C. § 831h(b)

(Cont'd)

Therefore, I conclude that the agency has met its burden of proof on this element and find that the RIF regulations were invoked for a legitimate management reason.[5]

2. *The agency established the RIF regulations were properly applied to the appellants.*

The appellants' competitive area for the RIF was the Sequoyah Nuclear Plant, and their competitive levels were: Security Shift Supervisor, Lieutenant, TVAN Responder, Alarm Station Officer, Public Safety Officer-Unarmed, and Engineering Associate. The retention registers reflect that all employees at the Sequoyah Nuclear Plant in each of these competitive levels were terminated or placed in another

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(Cont'd)
(1994) and is not subject to Circular A-76 and to many other Federal procurement laws and regulations. In light of my finding that any issues relating to compliance with Circular A-76, or any other procurement laws or regulations, I need not decide whether OMB Circular A-76 applies to TVA.

5. Although the appellants raised an allegation of age discrimination even though only some of the appellants are over 40 years old, their allegation pertains to the decision to contract out their jobs — a decision which, as noted above, is unreviewable by the Board. For that reason, I found that the appellants did not raise a prima facie case of discrimination on an issue that is reviewable by the Board and an evidentiary hearing on that issue was not necessary under the circumstances. *Cf. Currier v. U.S. Postal Service*, MSPB Docket No. DC-0351-95-0631-B-1 (July 29, 1998) (administrative judge cannot dismiss an allegation of discrimination under Title VII of the Civil Rights Act of 1964 prior to a hearing for failure to set forth a prima facie case).

position and that no employees remained in any of these competitive levels after June 1, 1998. *See* Agency Response, Tab 4b. The appellants did not make a timely challenge to the proper construction of their competitive area or levels.

Prior to the oral argument, the appellants argued generally that the agency violated Supplementary Agreement 10 between TVA and the Salary Policy Employee Panel.[6] *See* Appeal File, Tab 8. The appellants did not, however, identify any specific provisions that were violated. During the oral argument, the appellants argued that the agency violated all the provisions of the agreement and, when asked for specific examples, identified Sections C (Competitive Areas) and E (Retention Registers) were violated. The appellants did not timely raise any issues in regard to the proper construction of their competitive areas.[7] Nevertheless, because all the positions in the appellants' competitive levels in their competitive area were abolished and the appellants did not challenge the construction of their competitive level within their competitive area, any issues pertaining to the

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6. In light of my findings in regard to the appellants' arguments concerning Supplemental Agreement 10, I need not decide the factual question presented by the agency whether the agreement was in effect at the time of the RIF or whether it applied to all appellants. *See* Appeal File, Tab 11.

7. In my Order dated May 11, 1998, the appellants were ordered to notify the Board whether they were raising any issue in regard to the proper construction of their competitive area and competitive level. *See* Appeal File, Tab 3. Although their June 24 response was untimely, I nonetheless considered their submission. They did not, however, raise any issue in that submission regarding the construction of their competitive area.

proper construction of their retention register were irrelevant. And, since their competitive area was identified in the Supplemental Agreement 10 as the Sequoyah Nuclear Plant, the appellants have not shown how that provision of the agreement was violated.

Because all of the positions in the appellant's competitive levels within their competitive area were abolished, I find that the RIF regulations were properly applied to the appellants. Accordingly, I find that the appellants were properly separated by RIF procedures following the abolishment of his position.

3. *The appellants did not show that they were separated because of discrimination for their prior military service.*

The appellants argue that the decision to contract out their jobs was made because of discrimination based upon their prior military service and that the Board has jurisdiction over such an allegation under USERRA. *See* Appeal File, Tab 8. The appellants acknowledge that not all of them are veterans, but they argue that the non-veterans were "casualties" of TVA's decision to fire the veterans. *Id.* They further argue that there is a predominance of veterans occupying the security guard positions. *Id.*

As noted above, the decision to contract out jobs is not a matter that is reviewable by the Board. In any event, the agency separated all employees in the security function, thus treating veterans and non-veterans alike. I find, therefore, that the appellants did not set forth a nonfrivolous allegation that the decision to contract out or to separate them was based

on their military status. And, in my view, the non-veteran appellants cannot claim the protection of USERRA because the veterans were discriminated against.

Accordingly, the appellants' allegations under USERRA are rejected.[8]

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/ Lynn P. Yovino
Lynn P. Yovino
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on SEP 21 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date

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8. During the oral hearing, the appellants argued for the first time that there were fewer veterans in the TVA Police Officer positions, which are in both a different competitive level and area than the Security Guard positions. Again, that argument attempts to challenge the validity of the decision to contract out an entire function and that challenge is unreviewable by the Board. Moreover, the appellants do not argue that there were no veterans in the Police Officer positions. In any event, the argument was not timely raised and was not considered for that reason.

of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

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Washington, DC 20439

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NOTICE TO AGENCY/INTERVENOR

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Appendix D

APPENDIX

1. Estes Alder	AT-0351-98-0770-I-1
2. Clarence E. Ashford	AT-0351-98-0774-I-1
3. Ronald D. Barrow	AT-0351-98-0775-I-1
4. Thomas Barrow, Jr	AT-0351-98-0776-I-1
5. Melvin Benford	AT-0351-98-0777-I-1
6. Clifton Bishop	AT-0351-98-0778-I-1
7. Debra A. Blakemore	AT-0351-98-0779-I-1
8. Mary R. Blansit	AT-0351-98-0780-I-1
9. Wilson Bledsoe	AT-0351-98-0781-I-1
10. William Boynton	AT-0351-98-0782-I-1
11. Hamilton L. Broome, Jr.	AT-0351-98-0783-I-1
12. Carlos R. Brown	AT-0351-98-0784-I-1
13. Carolyn K. Brown	AT-0351-98-0785-I-1
14. Jimmy Cameron	AT-0351-98-0786-I-1
15. Christopher H. Campbell	AT-0351-98-0787-I-1
16. Roy Chandler	AT-0351-98-0788-I-1
17. James Coffelt	AT-0351-98-0789-I-1
18. Anthony B. Collins	AT-0351-98-0790-I-1
19. Michael Crawley	AT-0351-98-0791-I-1
20. Janet L. Crump	AT-0351-98-0792-I-1
21. Joseph Downs	AT-0351-98-0793-I-1
22. Warren Elliott	AT-0351-98-0794-I-1
23. Paula R. Essex	AT-0351-98-0795-I-1
24. Nathaniel Flanagan	AT-0351-98-0796-I-1
25. James J. Ford, Jr.	AT-0351-98-0797-I-1
26. Chris A. Foster	AT-0351-98-0798-I-1
27. Larry D. Gladden	AT-0351-98-0799-I-1
28. Terry D. Groves	AT-0351-98-0800-I-1
29. Billy E. Harris	AT-0351-98-0801-I-1
30. Slaughter L. Henderson	AT-0351-98-0803-I-1

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31. Gilford S. Hopkins	AT-0351-98-0804-I-1
32. Monroe W. Jones	AT-0351-98-0805-I-1
33. Barbara J. Keltch	AT-0351-98-0806-I-1
34. Randall F. Kilgore	AT-0351-98-0807-I-1
35. Edwin Klopfer	AT-0351-98-0808-I-1
36. James S. Lawson	AT-0351-98-0809-I-1
37. Jerry Layne	AT-0351-98-0810-I-1
38. Keith L. Manning	AT-0351-98-0811-I-1
39. Earl McCuiston	AT-0351-98-0812-I-1
40. Willard McCullough	AT-0351-98-0813-I-1
41. Robert McLeod	AT-0351-98-0814-I-1
42. Jerry Morgan	AT-0351-98-0816-I-1
43. Stephen Norwood	AT-0351-98-0819-I-1
44. Vanessa Parks	AT-0351-98-0820-I-1
45. John Pelham	AT-0351-98-0821-I-1
46. Wreba E. Poole	AT-0351-98-0822-I-1
47. William S. Prater	AT-0351-98-0823-I-1
48. Carl Presley	AT-0351-98-0824-I-1
49. Alvin A. Roach	AT-0351-98-0825-I-1
50. James H. Robinson	AT-0351-98-0826-I-1
51. Donald E. Rollins	AT-0351-98-0827-I-1
52. Jerry A. Romesburg	AT-0351-98-0828-I-1
53. Johnny N. Russell	AT-0351-98-0829-I-1
54. Patricia B. Rye	AT-0351-98-0830-I-1
55. Dwight E. Scott	AT-0351-98-0831-I-1
56. Michael L. Seay	AT-0351-98-0832-I-1
57. Donald B. Skiles	AT-0351-98-0833-I-1
58. Barton L. Smith	AT-0351-98-0834-I-1
59. Garrey J. Smith	AT-0351-98-0835-I-1
60. Michael L. Smith	AT-0351-98-0836-I-1
61. Raymond H. Smith	AT-0351-98-0837-I-1
62. Vannolan M. Smith	AT-0351-98-0838-I-1

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63. Clayta J. Sneed	AT-0351-98-0839-I-1
64. Lori M. Steave	AT-0351-98-0840-I-1
65. Donald C. Tiffin	AT-0351-98-0841-I-1
66. Donald M. Upchurch	AT-0351-98-0842-I-1
67. Edwin V. Walker	AT-0351-98-0843-I-1
68. Chrisdenator J. Weatherly	AT-0351-98-0844-I-1
69. Johnny L. White	AT-0351-98-0845-I-1
70. Charles L. Wilkey	AT-0351-98-0846-I-1
71. Leroy Williams, Jr.	AT-0351-98-0847-I-1
72. Paul H. Wilson	AT-0351-98-0848-I-1
73. Kenneth Hatmaker	AT-0351-98-0802-I-1
74. Larry Meredith	AT-0351-98-0815-I-1
75. Ralph Napier	AT-0351-98-0817-I-1
76. Michael Neyman	AT-0351-98-0818-I-1

APPENDIX E — INITIAL DECISION OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, ATLANTA REGIONAL OFFICE IN *ARNOLD, et al. v. TENNESSEE VALLEY AUTHORITY*, DOCKET NUMBER At-0351-98-0530-i-1 DATED AUGUST 14, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER
AT-0351-98-0530-I-1

DATE: AUG 14 1998

ROBERT C. ARNOLD, ET AL.,

Appellants

v.

TENNESSEE VALLEY AUTHORITY,

Agency.

* * *

BEFORE

Lynn P. Yovino
Administrative Judge

Appendix E

INITIAL DECISION

INTRODUCTION AND JURISDICTION

Between April 21 and May 1, 1998, the 65 appellants[1] in this consolidated appeal timely filed appeals of their separations pursuant to a reduction in force (RIF), effective April 3, 1998. Prior to the RIF, the appellants held the positions of Security Shift Supervisor (PG-5), Lieutenant (PG-3), TVAN Responder (SG-2), Alarm Station Officer (SG-2), and Public Safety Officer (SG-1) in the Nuclear Security organization at the Browns Ferry Nuclear Plant, Tennessee Valley Authority (TVA).

The Board has jurisdiction over these appeals.[2] 5 U.S.C. § 7701(a); 5 C.F.R. § 351,901. Because the appellants did

1. Those 65 appellants and their docket numbers are listed in the Appendix attached to this initial decision.

2. In its response to the appeal and during the telephonic oral hearing, the agency moved to dismiss the appeal of *Waylon D. Cottles v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0543-I-1, for lack of jurisdiction. The basis of the motion was that, because appellant Cottles transferred to the position of Performance Analyst, at the same grade and pay as his Nuclear Security position, he was not subjected to an appealable action in a RIF. *See* Agency Response, Tab 1. However, appellant Cottles was transferred from a permanent position to that of a temporary position. *See* Agency Response, Tab 4a. The Board has held that where the appellant's retention of his career tenure is only temporary, he was separated from his permanent position and such a separation is appealable to the Board under 5 C.F.R. § 351.901. *See Jones v. Department of the Army*, 42 M.S.P.R. 680, 689 (1990). The agency's motion is, therefore, DENIED.

not present a disputed issue of fact requiring an evidentiary hearing, the hearing was limited to oral argument, which was conducted by telephone on July 23, 1998.[3] For the reasons set forth below, the agency's actions ARE AFFIRMED.

BURDENS OF PROOF

In a RIF appeal, the burden is on the agency to prove by a preponderance of the evidence that the RIF regulations were properly invoked due to management consideration of the character appropriately committed to agency discretion. *See* 5 U.S.C. § 7701(c)(1)(B); *Bjerke v. Department of Education*, 25 M.S.P.R. 310, 312 (1984). In addition, when challenged, the agency must also establish by preponderant evidence that the RIF regulations were properly applied with respect to the appellant. 5 U.S.C. § 7701(c)(1)(B); *Holmes v. Department of the Army*, 41 M.S.P.R. 612, 617 (1989), *aff'd*, 914 F.2d 271 (Fed. Cir. 1990) (Table).

The appellants stated that they were raising four issues in this appeal and requested a hearing on those issues: (1) TVA's actions violated the RIF provisions of Supplement

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3. Pending before the Board are two other groups of consolidated appeals involving appellants who were Security Guards at the Sequoyah Nuclear Plant and the Watts Bar Nuclear Plant. *See Alder v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0530-I-1 (Sequoyah); *Ashe, et al., v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98-0679-I-1 (Watts Bar). By agreement of the parties, the hearing held on July 23 covered all three consolidations, and a fourth appeal of *Patsy S. Davidson v. Tennessee Valley Authority*, MSPB Docket No. AT-0351-98- 0896-I-1, which was severed from the *Alder* consolidation.

Agreement 10; (2) TVA's actions violated the Office of Management and Budget Circular A-76; (3) TVA's actions discriminated against the appellants based on their age; and, (4) TVA's actions violated the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 1994 U.S.C.C.A.N. (108 Stat.) 3149 (codified at 38 U.S.C. § 4301, *et. seq.*) (USERRA). *See* Appeal File, Tab 8.

ANALYSIS AND FINDINGS

1. *The RIF regulations were properly invoked in this case.*

The agency may establish a prima facie case that the RIF regulations were properly invoked by coming forward with evidence that the RIF was taken for one of the reasons set forth in 5 C.F.R. § 351.201(a)(2), *e.g.*, lack of work, shortage of funds, insufficient personnel ceiling, reorganization, the exercise of reemployment rights, or the reclassification of an employee's position due to erosion of duties. . . ." *Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195, 201 (1980). Once the agency makes out a prima facie case, the burden of going forward with rebuttal evidence shifts to the appellant but the burden of persuasion never shifts from the agency. *Id.* at 201-02. Thus, if the appellant presents no rebuttal evidence to challenge the bona fides of the agency's alleged reason for conducting the RIF, the agency's initial evidence will normally suffice to meet its burden of persuasion on this element. *Id.* at 201.

In this case, the agency's stated reason for invoking the RIF regulations was due to a reorganization. Specifically,

the record reflects, and it is undisputed, that the RIF was conducted following the agency's decision to contract out the safety officer function which resulted in the appellant's position being abolished. *See* Agency File, Tab 4c. Accordingly, based on the evidence of record, I find that the agency established a prima facie case that it invoked the RIF regulations for a legitimate management reason, *i.e.*, reorganization. *See Kelley v. Railroad Retirement Board*, 20 M.S.P.R. 188, 189 (1984).

The appellants have not challenged the fact that a reorganization occurred, Their only challenge to the bona fides of the RIF concerns the agency's decision to contract out their jobs allegedly in violation of the Veterans Preference Act.

It is well settled that a decision to contract out jobs is a reorganization. *See Kelley v. Railroad Retirement Board*, 20 M.S.P.R. 188, 189 (1984); *Griffin v. Department of Agriculture*, 2 M.S.P.R. 168, 170-71 (1980). And, when an agency has invoked the RIF regulations for one of the management reasons specified in 5 C.F.R. § 351.201(a), which includes a reorganization, the Board lacks jurisdiction to review the managerial considerations underlying the agency's exercise of discretion. *See Streitfield v. Railroad Retirement Board*, 20 M.S.P.R. 182, 183 (1984); *Griffin*, 2 M.S.P.R. 168, 170 (1980). In *Griffin*, 2 M.S.P.R. at 170-71, the Board held that, even if the agency's decision to contract out was contrary to OMB Circular A-76, agency regulations, and the Veterans Preference Act, this would not confer on the appellants the right to challenge that decision under 5 C.F.R. Part 351, which is the exclusive source of the

Board's jurisdiction in RIF cases. Thus, the appellants' contention that the agency violated OMB Circular A-76 and the Veterans Preference Act[4] when it decided to contract out the jobs in nuclear security is not reviewable.[5]

Therefore, I conclude that the agency has met its burden of proof on this element and find that the RIF regulations were invoked for a legitimate management reason.[6]

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4. The appellants' contentions that the agency's decision to contract out their jobs violated 5 U.S.C. § 3310 and 3320 and 5 C.F.R. Part 330 are unpersuasive. These statutory citations govern the application of veteran's preference to appointments in an agency and do not, in any way, restrict an agency's decision-making authority to contract out jobs or otherwise conduct a RIF. And, these regulatory provisions apply to the competitive service only (not to TVA positions which are all in the excepted service), and again, do not restrict the agency's decision-making to conduct a RIF.

5. The agency argues that it has independent procurement authority under section 9(b) of the TVA Act, 16 U.S.C. § 831h(b) (1994) and is not subject to Circular A-76 and to many other Federal procurement laws and regulations. In light of my finding that any issues relating to compliance with Circular A-76, or any other procurement laws or regulations, I need not decide whether OMB Circular A-76 applies to TVA.

6. Although the appellants raised an allegation of age discrimination even though only some of the appellants are over 40 years old, their allegation pertains to the decision to contract out their jobs — a decision which, as noted above, is unreviewable by the Board. For that reason, I found that the appellants did not raise a prima facie case of discrimination on an issue that is reviewable by the Board and an evidentiary hearing on that issue was not

(Cont'd)

2. *The agency established the RIF regulations were properly applied to the appellants.*

The appellants' competitive area for the RIF was the Browns Ferry Nuclear Plant, and their competitive levels were: Security Shift Supervisor, Lieutenant, TVAN Responder, Alarm Station Officer, and Public Safety Officer. The retention registers reflect that all employees at the Browns Ferry Nuclear Plant in each of these competitive levels were terminated or placed in another position and that no employees remained in any of these competitive levels after April 3, 1998. *See* Agency Response, Tab 4b. The appellants did not make a timely challenge to the proper construction of their competitive area or levels.

Prior to the oral argument, the appellants argued generally that the agency violated Supplementary Agreement 10 between TVA and the Salary Policy Employee Panel.[7] *See* Appeal File, Tab 8. The appellants did not, however, identify any specific provisions that were violated. During

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7. In light of my findings in regard to the appellants' arguments concerning Supplemental Agreement 10, I need not decide the factual question presented by the agency whether the agreement was in effect at the time of the RIF or whether it applied to all appellants. *See* Appeal File, Tab 11.

the oral argument, the appellants argued that the agency violated all the provisions of the agreement and, when asked for specific examples, identified Sections C (Competitive Areas) and E (Retention Registers) were violated. The appellants did not timely raise any issues in regard to the proper construction of their competitive areas.[8] Nevertheless, because all the positions in the appellants' competitive levels in their competitive area were abolished and the appellants did not challenge the construction of their competitive level within their competitive area, any issues pertaining to the proper construction of their retention register were irrelevant. And, since their competitive area was identified in the Supplemental Agreement 10 as the Browns Ferry Nuclear Plant, the appellants have not shown how that provision of the agreement was violated.

Because all of the positions in the appellant's competitive levels within their competitive area were abolished, I find that the RIF regulations were properly applied to the appellants. Accordingly, I find that the appellants were properly separated by RIF procedures following the abolishment of his position.

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8. In my Order dated May 11, 1998, the appellants were ordered to notify the Board whether they were raising any issue in regard to the proper construction of their competitive area and competitive level. *See* Appeal File, Tab 3. Although their June 24 response was untimely, I nonetheless considered their submission. They did not, however, raise any issue in that submission regarding the construction of their competitive area.

3. *The appellants did not show that they were separated because of discrimination for their prior military service.*

The appellants argue that the decision to contract out their jobs was made because of discrimination based upon their prior military service and that the Board has jurisdiction over such an allegation under USERRA. *See* Appeal File, Tab 8. The appellants acknowledge that not all of them are veterans but they argue that the non-veterans were "casualties" of TVA's decision to fire the veterans. *Id.* They further argue that there is a predominance of veterans occupying the security guard positions. *Id.*

As noted above, the decision to contract out jobs is not a matter that is reviewable by the Board. In any event, the agency separated all employees in the security function, thus treating veterans and non-veterans alike. I find, therefore, that the appellants did not set forth a nonfrivolous allegation that the decision to contract out or to separate them was based on their military status. And, in my view, the non-veteran appellants cannot claim the protection of USERRA because the veterans were discriminated against.

Accordingly, the appellants' allegations under USERRA are rejected.[9]

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9. During the oral hearing, the appellants argued for the first time that there were fewer veterans in the TVA Police Officer positions, which are in both a different competitive level and area than the Security Guard positions. Again, that argument attempts to challenge the validity of the decision to contract out an entire function and that challenge is unreviewable by the Board. Moreover, the appellants do not argue that there were no veterans in the Police Officer positions. In any event, the argument was not timely raised and was not considered for that reason.

Appendix E

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/ Lynn P. Yovino
Lynn P. Yovino
Administrative Judge

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This initial decision will become final on SEP 18 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

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Washington, D.C. 20036

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Appendix E

APPENDIX

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Roger L. Bell	AT-0351-98-0531-I-1
Michael E. Bloodworth	AT-0351-98-0533-I-1
Ralph D. Blackwood	AT-0351-98-0532-I-1
Susan D. Bloodworth	AT-0351-98-0534-I-1
Grady L. Bryant	AT-0351-98-0536-I-1
Donald Calvin	AT-0351-98-0538-I-1
Stanley L. Choat	AT-0351-98-0540-I-1
Judy A. Cooley	AT-0351-98-0542-I-1
Gary R. Cobb	AT-0351-98-0541-I-1
Johnnie W. Hardiman	AT-0351-98-0551-I-1
Loyd V. Frost	AT-0351-98-0550-I-1
Roger W. Foster	AT-0351-98-0549-I-1
Robert G. Erwin	AT-0351-98-0548-I-1
Charles G. Erwin	AT-0351-98-0547-I-1
Gregory A. Ellenburg	AT-0351-98-0546-I-1
David L. Eddy	AT-0351-98-0545-I-1
Robert M. Dawson, Jr.	AT-0351-98-0544-I-1
Mitzie C. Parker	AT-0351-98-0567-I-1
Terry E. Nixon	AT-0351-98-0566-I-1
Roger D. Nichols	AT-0351-98-0565-I-1
Mary E. Nichols	AT-0351-98-0564-I-1
James R. Newton	AT-0351-98-0563-I-1
Glenn D. Naylor	AT-0351-98-0562-I-1
Donald L. McGrady	AT-0351-98-0561-I-1
Ricky E. McDougal	AT-0351-98-0560-I-1
John W. Stewart	AT-0351-98-0583-I-1
Jackie P. Stewart, Jr.	AT-0351-98-0582-I-1

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Roger D. Smith	AT-0351-98-0581-I-1
Alton T. Smith	AT-0351-98-0580-I-1
David C. Sloan, Jr.	AT-0351-98-0579-I-1
David A. Shaneyfelt	AT-0351-98-0578-I-1
Roland E. Rogers	AT-0351-98-0577-I-1
Ralph O. Grissiom	AT-0351-98-0576-I-1
Charles W. Belue	AT-0351-98-0528-I-1
Phillip L. Hardaway	AT-0351-98-0616-I-1
Karla G. McAllister	AT-0351-98-0592-I-1
James A. White	AT-0351-98-0591-I-1
Talmage L. Watson, Jr.	AT-0351-98-0590-I-1
Donald S. Warren	AT-0351-98-0589-I-1
David H. Ussery	AT-0351-98-0588-I-1
Terry W. Tyler	AT-0351-98-0587-I-1
Peter A. Thompson	AT-0351-98-0586-I-1
Donald R. Thompson	AT-0351-98-0585-I-1
Hal H. Swartz	AT-0351-98-0584-I-1
Mary K. Goodwin	AT-0351-98-0575-I-1
David A. Gasque	AT-0351-98-0574-I-1
William D. Gardner, Jr.	AT-0351-98-0573-I-1
Arthur L. Ricks	AT-0351-98-0572-I-1
Elaine M. Reece	AT-0351-98-0571-I-1
William E. Phillips	AT-0351-98-0570-I-1
Anthony L. Parks	AT-0351-98-0569-I-1
Patrick L. Parker	AT-0351-98-0568-I-1
Timothy L. Maddox	AT-0351-98-0559-I-1
Jonathan C. Marshall	AT-0351-98-0558-I-1
James M. Major, III	AT-0351-98-0557-I-1
James D. Longshore	AT-0351-98-0556-I-1
Charles D. Lawson	AT-0351-98-0555-I-1

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Wayne M. Lentz	AT-0351-98-0554-I-1
Shields L. Jones	AT-0351-98-0553-I-1
Daniel J. Hunt	AT-0351-98-0552-I-1
Waylon D. Cottles	AT-0351-98-0543-I-1
Cipriano C. Chavez	AT-0351-98-0539-I-1
William D. Burwell	AT-0351-98-0537-I-1
Robert P. Brown	AT-0351-98-0535-I-1

APPENDIX F — ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, ATLANTA REGIONAL OFFICE DATED JUNE 23, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER
AT-0351-98-0530-I-1

DATE: JUN 23 1998

ROBERT C. ARNOLD, ET AL.,

Appellant,

v.

TENNESSEE VALLEY AUTHORITY,

Agency.

ORDER

On May 11, 1998, I issued an Order to the appellants' representatives ordering them to file a statement within 20 days of the date of the Order whether they are raising an issue as to whether the RIF regulations were properly invoked for legitimate management reasons or whether the RIF regulations were properly applied (proper construction of competitive area and level and proper release from competitive level). The appellants' representatives were

Appendix F

advised that their responses would be used to determine whether they are raising an issue of fact regarding an evidentiary hearing or whether the hearing would be limited to oral argument.

On June 11, 1998, the appellants, representative contacted me to request procedural information. I contacted him on or about June 16 concerning his inquiry, and I was told that it involved what form the redlined "statement" should take. I responded that it should be in print form, identifying the factual and legal issues the appellants are raising. I informed the appellants' representative that the statement was late and should be filed as soon as possible. He assured me that he would file it right away.

As of June 23, I have not received a response to my May 11 Order. The time for filing such response was June 1, 1998. Accordingly, I find that, because the appellants have not identified any factual issues in dispute, the hearing in these appeals will be limited to oral argument by telephone.

The oral argument will commence at 1:00 p.m. (Eastern) on July 15, 1998. The agency is ORDERED to make the arrangements to initiate the conference.

FOR THE BOARD: /s/ Lynn P. Voyno
Lynn P. Voyno
Administrative Judge